IN THE

Supreme Court of the United States.

OCTOBER TERM, 1898.

LUCETTA R. MEDBURY, *Appellant*,
v.
THE UNITED STATES. } No. 225.

BRIEF FOR APPELLANT.

This case is an appeal by appellant from a decision of the Court of Claims dismissing appellant's petition in that court for want of jurisdiction.

Appellant is the heir of an entryman who paid the double minimum price, or $2.50 per acre, for several thousand acres of land in the State of Wisconsin, in the year 1872, the double minimum price being charged for the reason that the lands entered were at that time within the place limits of the grant to the Wisconsin Central Railroad made by the act of March 5, 1864 (13 Stat. L., 66). The road was never built opposite the land in question, and in 1890 Congress forfeited the portion of the grant opposite the said lands. Subsequently appellant made application to the Secretary of the Interior for the repayment of the excess of $1.25 per acre paid over the single minimum rate, under the provisions of the act of June 16, 1880. This application was rejected by the Secretary, whereupon appellant filed her petition in the Court of Claims, which was dismissed by that court for want of jurisdiction.

There are but two questions in the case: first, as to the applicability of the act of June 16, 1880, and, secondly, as to the jurisdiction of the Court of Claims.

The Applicability of the Act of June 16, 1880.

This statute provides:

"And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

Upon the forfeiture of the railroad grants by the act of September 29, 1890, opposite the uncompleted portions of railroads, the Secretary of the Interior was applied to for the repayment of the $1.25 per acre under the act of 1880, the lands entered having finally been found not to be within the limits of a railroad land grant. By decision of the Secretary of the Interior in the case of George G. Foster (Vol. 12, p. 316), the application in such case was rejected, the Secretary holding that:

"The purchase in question was made in 1886, when the price was double minimum, and it can not be said that the double minimum was erroneously charged. Such price was properly charged, and there is no authority for the repayment of any part of said amount under the act of June 16, 1880, or any other act." (Texas Pacific Grant, 8 L. D., 530; Jacob A. Gilford, 8 L. D., 583.)

The Secretary denied the application in this case for precisely the same reason. The question is, whether there is any foundation in law for the denial of the application in these cases.

An examination of the act of 1880 shows that it has

no such limitation as put upon it by the Secretary of the Interior.

The matter of railroad grants, and the reserved even sections, has been often before this court, and needs no discussion here now.

It is sufficient to recall that the court has many times defined the object of Congress in making $2.50 per acre the minimum price for alternate reserved sections along the line of railroads within the limits granted by any act of Congress. In United States *v.* Missouri, K. & T. R. R. Co., the court defined this object as follows:

"As the natural result of the construction of the road aided would be an increase in the market value of the reserved sections remaining to the United States, within the place limits of the Leavenworth road, those sections were not left to be disposed of under the general laws relative to the public domain. But in order that the Government might get the benefit of such increased value, and thereby reimburse itself to some extent for the lands granted, the act of 1863 made special provisions in reference to the reserved sections and thereby, for the accomplishment of particular purposes, expressly declared, segregated them from the body of the public lands of the United States."

And in United States *v.* Ingram, No. 82 of the present term, decided January 3, 1899, the court said:

"The general policy in respect to railroad grants, expressed in many statutes making such grants, and finally carried into the Revised Statutes in section 2357, is that while the ordinary price of public lands is $1.25 per acre, 'the price to be paid for alternate reserved lands, along the line of railroads within the limits granted by any act of Congress, shall be $2.50 per acre.' * * * The reason for this addition to the price of alternate reserved sections within a railroad grant has been often stated by this court, and is referred to in the opinion in United States *v.* Healey, *supra*. It is that a railroad ordinarily

enhances the value of contiguous lands, and when Congress granted only the odd sections to aid in the construction of one it believed that such construction would make the even and reserved sections of at least double value."

Bearing in mind, therefore, that the price of all agricultural lands is $1 25 per acre, except that of alternate reserved sections along the lines of railroads within granted limits, it follows that wherever this double minimum price has been charged for public lands that do not actually receive the benefit of a completed railroad, an injustice has been done. The Government has received $2.50 per acre in the way of recoupment for a grant, when it has parted with no lands and needs no recoupment. Unless the land for which the double price has been charged is actually along the line of a railroad, the construction of which was induced by the Government grant, there has been a failure of consideration on the part of the Government to the extent of one-half of the purchase money, or $1.25 per acre. This failure of consideration and the resulting equitable claim to repayment, Congress undertook to make good by the act of June 16, 1880. It is a general act and it is probable that by no other selection of words could Congress so clearly have described its object; which is to grant repayment in every case where the double minimum price had been charged by reason of a railroad grant, and the reason for that charge had ceased.

The act applies to every case where it can be shown that the double minimum price has been charged, and where the land entered has afterwards been found not to be within a grant.

This condition can come about in a number of ways.

First. It may be shown that the land entered was not within the actual limits of a grant at time of entry, the

double minimum having been charged by mistake of the local land officers in construing the map of the grant sent them by the Land Office.

Second. The land may have been within the limits of the grant as defined by the first map, or the map of general route, which was authorized to be filed in several of the granting acts, and on the filing of the map of definite location the land may have become outside the grant as definitely fixed.

Third. The Department may have construed a grant to extend to certain places and subsequently been overruled in this by a judicial decision, or by a subsequent Departmental decision.

Fourth. Congress might, by legislation, change the location of the route and of the grant.

Fifth. Congress might forfeit the grant for the non-building of the road, or a portion thereof, and resume title to the odd sections previously granted.

Sixth. A grant might be declared forfeited by judicial proceedings where the road has not been built in conformity with the granting act.

In all of the cases mentioned land for which double minimum price had been paid would afterwards be found not to be within the limits of a grant. The consideration for which the extra $1.25 per acre had been paid would, therefore, have failed. In each of the cases specified there would be a right to the repayment of the $1.25 per acre mentioned in the law. They all come within the words of the law, and within its meaning. And it is not to be supposed that Congress did not intend the redress to be given in every such case.

The Secretary, however, does seek to limit the law, as shown by the decision in the Foster case and in this case. His construction would limit the law to a portion only of the cases in which repayment would be due, and

those not the most meritorious portion. Of the many ways in which the consideration for the extra $1.25 per acre might fail, and entitle an entryman to repayment, there can be found but two which would bring him within the rule prescribed by the Secretary. Those cases are the first and third of the number we have given; where land has been charged double minimum by mistake of the Government officers as to the actual location of the land; and where the Departmental decision as to the extent of a grant has been overruled by a subsequent Departmental or judicial decision, narrowing the grant. In each of these cases it might be said that the double minimum price was erroneously charged, and also that the land had afterwards been found not to be within a grant; and they would, therefore, come within the rule laid down by the Department. No other case would.

Of this construction we have to say that it is unwarranted by the language of the act; that it is opposed to the policy and meaning of the act; and, furthermore, that it is inconsistent with the practice of the Department itself.

1. The Departmental construction, in effect, consists in reading the word "erroneously" into the act before the words "paid double-minimum," so as to make it read:

"And in all cases where parties have erroneously paid double-minimum price, etc."

It is well settled that in construing a law neither an executive officer nor a court is at liberty to introduce into a statute words not found there. This court said in L. L. & Galveston R. Co. *v.* The U. S., 2 Otto, 733–760:

"To do this words must be introduced, but treaties like statutes must rest on the words used, 'nothing added thereto, nothing diminishing.'

"In Rex *v.* Barrell, 12 Ad & Ell., 468, Patteson, Justice, said:

" 'I see the necessity of not importing into statutes words which are not found there. Such a mode of interpretation only gives occasion to endless difficulty.' And the courts have always treated the subject the same way when asked to supply words in order to give a statute particular meaning which it would not bear without them. Rex *v.* Poor Law Comrs., 6 Ad. & Ell., 7; Everett *v.* Walls, 2 Scott, N. C., 531; Green *v.* Wood, 7 Q. B., 178."

What the court here says can not be done is exactly what the Department in its ruling in this case has done. It has attempted to introduce or supply a word not found in the statute. This word "erroneous" is not implied in the law, nor is it implied in the reason for the law. The entryman is just as much entitled to repayment in equity if his land becomes outside a grant by a change in the route, or by forfeiture, as he would be in case his land is found to be outside a grant by actual measurement. It is the failure of the consideration for the extra $1.25 per acre that is the reason for the enactment of the law.

The failure of the consideration for the extra $1.25 per acre is the same in both cases. As Congress has not limited the repayment by the use of the word "erroneously" the act must be construed to apply to every case, whether the double-minimum was rightfully or erroneously charged, where the land is afterwards found not to be within a grant. If the object of Congress was the correction of an erroneous act on the part of the local land officers the act would have read differently. It would have been to this effect.

"That wherever the General Land Office has charged for lands more than the legal price thereof the Secretary shall repay the sum overcharged, etc."

But this is not what Congress has said. The Secretary is not authorized to refund an overcharge in general. That would be to give one Secretary, who might differ from a former Secretary as to the price fixed by law upon the public lands, the right to make repayment, when the matter was one that called for the jurisdiction of the courts. But in the class of cases mentioned in the law, where the double-minimum price had been paid for land which was afterwards found not to be within the grant by reason of which the double price was charged, Congress did direct the Secretary to make the repayment.

That the object of the law was not the correction of errors on the part of the General Land Office is apparent from the decisions of the Secretary in construing the act, wherein, as in the case of Joseph Brown, 5 L. D., 316, and in Coffee's case, 19 L. D., 580, where there was an admitted overcharge of $1.25 per acre, the Secretary held he had no authority to grant repayment, because the lands were found to be inside a grant. It is, therefore, the question of the location of the land, with respect to the grant, that determines the right to repayment, not the question as to whether the double minimum price was erroneously or rightfully charged.

Furthermore, the ruling in this case, to the effect that there could be no repayment where the double minimum price was rightfully charged, even though the land afterwards be found not to be within a grant, is inconsistent with the decisions and the practice of the Department itself. In the class of cases which we have designated the second class, namely, those where lands were within the limits of the grant according to the map of general route, and became outside of the grant by the map of definite location, repayment has been granted by the Secretary, notwithstanding the rule laid down in the Foster

case, that the law does not apply to cases where the double minimum was rightfully charged.

This is shown by the language of Secretary Teller in the case of William P. Maclay, Vol. 2, p. 675, where he states:

"It not unfrequently happens that the granted limits as fixed by the map of general route are changed by filing the map of definite location, and lands included in the first limits are left outside of the grant as definitely fixed. Such lands are sometimes purchased while within the first limits, *and being then subject to double minimum are paid for at that price.* When finally found to be outside of the grant, the reason for such price fails, hence the necessity for the restoration of the excess of $1.25 per acre."

Repayment in such cases has always been made, as evidenced by this language. Therefore the reason assigned for denying the repayment in this case and in the Foster case is controverted by the practice of the Department itself. The Department does not confine itself to the repayment of the double minimum in cases where that price was erroneously charged, but grants the repayment as a matter of course in the class of cases referred to, where it is admitted that the double minimum was rightfully charged. Every word of this statement is just as applicable to this case as to the case mentioned. "When finally found to be outside the grant, the reason for such price fails, hence the necessity for the restoration of the excess of $1.25 per acre." So, in this case, the land, after the forfeiture, being found not to be within the grant, the reason for the extra price fails, and the necessity for the restoration of the excess of $1.25 per acre arises.

Still another suggestion of the construction of the law is found in the case of Thomas Kearney (Vol. 7., p. 29). In that case double-minimum had been charged the entryman after the forfeiture of the grant, and Secretary

Vilas directed the repayment of the double minimum excess in these terms:

"It having been found that the land entered was not when entered within the limits of a railroad land grant it follows that the application of Kearney falls within the provisions of the act above quoted."

Here the right to the repayment is based upon the fact that the land was not, when entered, within a grant; not upon the fact that the double minimum price was wrongfully charged. This construction attributes to the act of Congress this meaning:

"And in all cases where parties have paid double minimum price for land which has afterwards been found **not to have been at time of entry** within the limits of a railroad land grant the excess of one dollar and twenty-five cents per acre shall be repaid," etc.

The actual language of the act is different. It relates to land which has afterwards been found not **to be** within a grant.

The state of the land at the time of the finding is what determines the right to the repayment; not the state of the land at the time of entry.

Take the case mentioned in the decision in Maclay's case, above referred to, of land within the limits of the grant according to the map of general route. An application for repayment of the double minimum while land is in such condition must fail, because it can not be said that the land is outside a grant. Afterwards, when the map of definite location is filed, the tract is left outside the grant as finally determined. An application for repayment must then be allowed, because it is then found that the land is not, at the time of the finding, or the decision of the Secretary upon the application, within a grant.

Moreover, suppose that application in such a case was delayed some years and in the meantime another grant had been made which included the same tract. And suppose an application is then made for the repayment by reason of the change of the first grant. The application must be denied, for the reason that the land is not found, at the date of the decision on the application, not to be within a grant.

Suppose in Kearney's case the land was included within a subsequent grant, at time of application for repayment. Would the fact that the land had been outside of a grant at date of entry give a right to the repayment? Not so. The Secretary could not find at that time that the land was not within a grant, and could not authorize the repayment, for the reason that the law does not read as it is implied in the Kearney case "land afterwards found not to have been at time of entry within a grant," but reads "afterwards found not to be within a grant."

These considerations answer, we believe, the two theories of the act suggested by the Department rulings. These theories are not justified by the words of the law, and require an alteration of those words so as to bring about an entirely different meaning, contrary to all rules for the construction of statutes, or any other written instruments.

We believe the intention of Congress as shown in this statute is plain; and that is, to cause repayment to be made in every case where double-minimum price has been charged a purchaser by reason of the increased value of the lands purchased where the consideration for such increased price has failed; either by reason of the land not being within a grant in the first instance; by its becoming outside a grant from an alteration of the route by the railroad company or by Congress; or by an act of

forfeiture putting an end to the grant. In all these cases the reason for the charge of the double price has ceased. It has turned out that the lands which it was supposed might be benefited by the railroad have not been so benefited, and Congress recognized the obligation and provided for the repayment. The act recognizes the fact that all grants are in a manner tentative until the road is built and the grant earned. Until that time they are liable to be altered by the act of the railroad company or by an act of Congress changing the route, or an act of forfeiture for non-building. All these cases come under the law as plainly as do the cases admitted by the Department.

Suppose in this case Congress had altered the line of the road so as to leave the land entered by appellant outside of the grant as thus altered. Would not the land be then found not to be within a grant, and would not appellant be just as much entitled to the repayment as if his land had been found not to be within a grant by the filing of a map of definite location?

And is an act of forfeiture any different? In this case it was merely an act fixing the terminal limit of the grant, as the road had been constructed as far as Ashland. Are those who paid double minimum price beyond Ashland, expecting the road to come thus far and increase the value of their lands, to pay the same amount as those who obtained the road? We think Congress provided for all such cases of failure of consideration. The reason for the repayment in this case is greater than if the land had merely been found to be outside a grant by a mile or so upon the filing of a map of definite location. In that case he would have had the road, his land would have been substantially benefited by the road, even at a distance of a few miles, while in this case, and in all other cases of forfeiture for non-building, he would not

have the road at any distance. The reason for the repayment is much greater. Is it conceivable that Congress provided for the lesser equity, unmindful of the greater?

Appellant comes squarely within this law. When she applied for this repayment the Secretary was bound to find, as he did find in his decision rejecting the application, that the land was not within the limits of a railroad land grant. We thus have a case where it appears that double minimum price has been paid for land afterwards found not to be within a grant. We have shown that the view assigned by the Secretary for denying the application is erroneous. The next point for our consideration is as to the effect of this erroneous view and the consequent rejection of the application upon the rights of the appellant.

The Court of Claims Has Jurisdiction.

The Court of Claims took the view that the rejection of the application by the Secretary was final, and that it had no jurisdiction; that the Secretary had exclusive jurisdiction under the act of June 16, 1880.

While it is true that the public land laws constitute a special and complicated body of laws, and that they are intrusted primarily to the Secretary of the Interior for enforcement, it is by no means true that there is no appeal to any court from the decisions of the Secretary. The rule laid down by the Supreme Court is that to the Secretary is intrusted the final determination of facts in such cases as may come before him, and that his decisions as to facts are conclusive upon all the courts, but that his interpretation of the law is always subject to review and to reversal in a court of competent jurisdiction. (Cunningham *v.* Ashley, 14 How., 377; Lindsey *v.* Hawes, 2 Black, 554–563.)

All the cases involving the construction of the grants to railway companies are to the same effect, and show that counsel's contention is not well founded. In the case at bar there are no questions of fact involved. All the facts alleged by the claimant are of record in the Interior Department, and are admitted by the Secretary in his decision rejecting the application for repayment and in his return made to this court. What is involved here is simply the right of the claimant, as a question of law, to the repayment asked for. It was for the purpose of deciding just such questions that this court was instituted. This case is not peculiar or different in any way from the ordinary cases coming before this court. Every case coming here must have arisen in its inception in some Department of the Government and in some body of laws peculiar to that Department and intrusted to that Department for execution, just as this case originated in the Interior Department and in the laws relative to the public lands. Unless there is some positive provision of the law creating this court, or of some subsequent law depriving the court of jurisdiction in cases arising under the public land laws, this court must have jurisdiction in this case, and it is needless to say that no such provision has been or can be brought forward. We need only refer to the cases arising under the land laws in which this court has taken jurisdiction, such as the class of claims represented by the cases of Benjamin Healey, Frederick Southworth, and Daniel Van Iderstine, to show how contrary to the practice of this court is the claim now made by counsel for the United States, and how little it is warranted by either principle or precedent.

The second ground that was assigned for the demurrer in the Court of Claims—that the act of June 16, 1880, devolves the special duty of making the payments therein provided for upon the Secretary of the Interior, and that

in no event can this court enforce the rights conferred by that law—is equally without just foundation.

The form of the act is not different from most acts of Congress by which rights or claims against the Government are created. The Government necessarily acts primarily through its agents, the heads of the different Departments, and, accordingly, nearly every act which can ever come before this court for construction will be found to be directed to the head of some Department. It is not contemplated in these laws that the Secretary to whom the order may be directed will refuse or fail to take the action therein contemplated, and hence there is no provision in any of them conferring jurisdiction upon this court in the event that the Secretary acts erroneously or not at all. Such jurisdiction is conferred by the general act defining the jurisdiction of this court. To hold that this court has no jurisdiction in a case because it arises under a law in which the court is not mentioned would be to deprive the court of jurisdiction in every case not especially referred to the court by the act of Congress, such as the Indian depredation, French spoliation, and other claims referred to the court by special acts from time to time, as in none of the general acts fixing salaries, fees, or creating rights against the Government is the court expressly mentioned. And yet no one can doubt that behind every such act is the Court of Claims, instituted for the very purpose of enforcing rights conferred by law when such rights are denied or misconstrued by the executive officers intrusted with the execution of the law.

The act of June 16, 1880, was enacted, as are other laws, with a full knowledge on the part of Congress of the existence of this court, and of its jurisdiction in such matters, and no especial mention of the court is necessary to give it jurisdiction here. Such jurisdiction could only

be taken away by a special provision in the law that the court should not have jurisdiction, otherwise the general jurisdiction of the court in such cases will prevail. We need not point out that there is no foundation for the assumption that Congress designed to leave the question of repayment entirely with the Secretary. There would be no reason for any such action. In fact, the reasons would be all against such action, as we can conceive of no class of cases in which a judgment of a court would be more desirable than the class represented by the act of June 16, 1880, which provides simply for the repayment of purchase money paid for land entries to which the Government could not give title, and for the repayment of $1.25 per acre overcharged when it is apparent that there has has been such an overcharge. When such repayments are denied by the Secretary, no reasons can be given why this court should not inquire into the legal rights of the claimant and give judgment accordingly.

The court has rendered jugments in many cases founded upon acts of Congress similar in form and purpose to the act of June 16, 1880. The Act of March 2, 1891 (chap. 496, vol. 26, Stat. L.), for the refund of the direct tax collected under the act of 1861, is a case in point. That act provided "that it shall be the duty of the Secretary of the Treasury to pay to such persons as shall in each case apply therefor," etc., and it is well known that in default of action by the Secretary of the Treasury the claimants have brought suit in this court and recovered judgments in many cases.

The case of United States, appellant, *v.* Charles M. Taylor (104 U. S., pp. 216, 222) is another instance. That case arose under the act of June 7, 1862, making it the duty of the Secretary of the Treasury to repay, upon application being made, the moneys in the Treasury

which had been realized by the sale of real property for taxes in excess of the taxes for which the sale had been made. In Taylor's case the Secretary refused to make the payment, and suit was brought in this court to recover judgment for the amount due under the statute, and this suit was successful. The Supreme Court affirmed the judgment, holding that a right of action in this court accrued when the Secretary refused to make the payment. Similar to this was the decision of the Supreme Court in Lawton's case (110, p. 146), wherein the court said:

"The application made to the Secretary for the surplus not having been complied with, the appellee was entitled to bring this suit as on an implied contract to pay over the surplus."

The reason for the assumption of jurisdiction by this court in such cases is plain. It is that a right has been created by act of Congress and that this right should not be permitted to fail by reason of the opposition of the officer whose duty it is to carry out the will of Congress. The legal ground of the jurisdiction is stated by the Supreme Court in the case of United States *v.* Kaufman (96 U. S., 567–572), in which the court said:

"But here the case is different. The claim has been presented to and allowed by the proper officer. The claimant has pursued the statutory remedy to the end. No special remedy has been provided for the enforcement of the payment, and consequently the general laws which govern the Court of Claims may be resorted to for relief if any can be found applicable to such a case. This is upon the principle that 'A liability created by statute without a remedy may be enforced by an appropriate common-law action * * * and as against the Government there are no common-law actions, any appropriate action within the scope of the jurisdiction of the Court of Claims may be resorted to unless specially prohibited. Here the

right has been given and a liability founded upon a law of Congress created. Of such liabilities the Court of Claims has jurisdiction, and no other remedy has been provided."

It is clear, then, that under the decisions referred to, and many others not mentioned, with which the court will be familiar, the court has jurisdiction in this case.

The Court of Claims arrived at its conclusion of want of jurisdiction by dividing all claims into classes and then summarily placing claims under the act of 1880 for double-minimum excess in the one class in which it held it had no jurisdiction. No reason is given for this assignment except that the act of 1880 created a right which did not exist before and a remedy which must be exclusive. The court held in effect that there was only one law giving the right to repayment of double-minimum excess, hence it had no jurisdiction. If there had been two laws giving this right, then it would have had jurisdiction. Such in effect is the closing argument of the opinion.

The opinion misconceives what is meant by an exclusive remedy in such cases. All that is meant is that the remedy given must be followed as far as provided by the law. In this case, as in the Taylor case, the Lawton case, and the Kaufman case, the remedy provided by the law must be followed as far as it goes. But when that remedy ceased, and the right given by law is still unsecured, then there arises the right to sue in the Court of Claims to enforce the right given by Congress. It is a claim founded upon a law of Congress and is covered amply by the jurisdictional act.

The Nicoll case, cited by the Court of Claims, is entirely unlike the case in hand. In that case there existed long prior to the creation of the Court of Claims a system for the judicial trial of revenue cases. In the

Nicoll case the court held that such cases were excepted from the jurisdiction of the Court of Claims. In this case there is no judicial system, apart from the Court of Claims, and the act creating the liability on the part of Congress was passed long subsequent to the creation of the Court of Claims.

We therefore believe that the Court of Claims had jurisdiction to enter judgment in this case for the amount due under the act of June 16, 1880, on the refusal of the Secretary of the Interior to allow the claim, and we ask that the decision of the Court of Claims be reversed with directions to enter judgment for the appellant for the amount shown to be due.

HARVEY SPALDING,
E. W. SPALDING,
Attorneys for Appellant.

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Brief of Spalding & Spalding for Appt.

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Reply to Brief on behalf of the United States.

HARVEY SPALDING,
E. W. SPALDING,
Attorneys for Appellant.

THE ADVERTISER CO., 618 F N. W.

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ASSIGNMENT OF ERRORS.

The Court of Claims erred in refusing to exercise jurisdiction in this case and in dismissing the petition.

Our brief on behalf of the appellant proceeded upon the foregoing assignment of errors which, however, were not stated with sufficient formality.

The foundation of the claimant's suit is the second paragraph of section 2 of the act of June 16, 1880, which reads as

follows: "And in all cases where parties have paid double minimum price for land which has afterwards been found not to be within the limits of a railroad land grant, the excess of one dollar and twenty-five cents per acre shall in like manner be repaid to the purchaser thereof, or to his heirs or assigns."

This statute, every word of it, shows it to be a law necessary for the correct administration of the law existing at that time fixing the price of public lands.

To a correct understanding of its full force and plain intent, it is necessary to briefly consider

THE LAW OF PRICE OF PUBLIC LANDS THEN EXISTING.

This law is contained in Sec. 2357, R. S. It divides public lands into two classes, and the absolute line between these two classes is the limits of actual grants of lands made to secure the construction of railroads. The limits of every railroad grant in the United States are drawn and marked on public maps in the General Land Office, and show the location of every acre of public land within the limits of such grants as segregated and set apart from the other great class of lands, namely, the lands outside of the limits of grants made to construct railroads. The law attaches the one price of $1.25 an acre to every acre of these lands (other than cases specially excepted by law) outside the drawn limits of record of grants to railroads. And the law sttaches to every acre of public lands within the limits of such grants the one price of $2.50 an acre. These marked limitations and the records of the Land Office show that in numbers of cases the United States have sold land for $2.50 per acre, the price of which by law is $1.25 an acre. Upon consideration the reason of this is plain, and it is shown in fact by the record of this case. The first finding of facts states that "Congress by the act of May 5, 1864 (13 Stat., L. 66), made a grant of lands to the State of Wisconsin for the purpose of aiding in the construction of a railroad from Portage City, Doty's Island, or Fond du Lac, as said State might determine, in a northwestern direction to Bayfield, and thence to Superior City on Lake Superior, *which grant was by the terms of the act made upon condition that said railroad should be built.*"

"Whereupon by authority of the Secretary of the Interior, the price of lands *proposed to be reserved* within the limits of said conditional grant along the line of the *proposed rail-*

road between Ashland and Superior City, was raised from $1.25 per acre to $2.50 an acre." (Second Finding.) Thus it appears that whenever the limits of a grant of lands *contracted for* was marked out, the lands proposed to be granted were identified and set apart for the grant, and the lands proposed to be reserved were identified and set apart for sale at $2.50 per acre. The very method of the grants rendered this necessary. It rendered necessary that the Government should set apart in trust for the railroads the lands to be granted and to set apart the lands to be reserved for sale at $2.50 per acre, the price being necessarily a conditional price, subject to the same conditions that the grant itself was subject to, namely, the construction of the railroad, upon which condition only the grant could take effect. The sole statutory condition and consideration of an extra price of $1.25 per acre is shown to be the construction of a railroad near the lands by the appropriation therefor of the sections of land alternate to those subjected to such extra price. The actual limits of a railroad land grant were in every instance finally settled and determined by the adjustment of the grant, and the grant was never adjusted except on or after the actual transfer of the lands to the company. It followed that in many cases upon adjustment of the grant it was shown that lands had been sold for $2.50 per acre which were not within the limits of the grant. Manifestly, in every instance where the price of lands within a grant has been charged for land afterwards found to be not within such limits, such lands were never within the limits of a grant. Much confusion of ideas seem to prevail in the discussion of this subject in confounding an actual grant of land to a railroad company with that of a grant proposed or contracted for, which never in fact was made. Manifestly, there never was a grant of land to a railroad company where no lands were transferred. And there is a plain distinction between the grants contracted for and actual grants, for the known reason that many grants contracted for were never in fact made, and their forfeiture was declared by act of Congress. There can be no forfeiture of any actual grant of lands to railroads, because in every such case the lands have been conveyed to the railroad. The very word forfeiture, in such cases is limited to grants proposed or contracted for. It is contracts for grants made upon condition of construction of a railroad which alone are subject to forfeiture. In administering the law the lines of the limits of the grants proposed were drawn, but no such lines are described in Sec. 2357 R. S., which alone divides the $2.50 per acre class of lands from the $1.25 per acre class. The sole basis and consideration for the extra price of $2.50

per acre is by statute shown to be the fact that a railroad was constructed near such land by the appropriation of sections of land alternate thereto. Where no railroad was thus constructed and no alternate sections transferred and appropriated to effect such construction of a railroad, there was no basis and no consideration for such extra charge. There is no case where lands of the $1.25 class have been subjected to pay the price of the $2.50 class in which the obligation does not rest upon the Government to repay to the purchaser the extra charge. Before the act of June 16, 1880, it is true that the purchasers in such cases were without the means to enforce this obligation. The learned counsel for the appellees has shown to the court what injustice such purchasers suffered before the act of June 16, 1880, was passed. On page 23 of his brief he quotes from Mr. Berry, of the Committee on Public Lands, who said: "The bill as amended also provides that in cases where parties have been required to pay double minimum price for lands *supposed* to be within railroad reservations, and it afterwards proved not to be within said reservations * * * the Secretary of the Interior shall refund the extra $1.25. * * * The Government should certainly refund the money to the parties to whom it justly belongs, and has no right to retain money for which it gave nothing. * * *" Mr. Berry, one word more; one feature of the bill is to refund the extra $1.25 where the amount was supposed to be double minimum when the Government sold it and the price of $2.50 per acre was paid, but which was afterwards ascertained not to be double minimum land. This $1.25 per acre lies in the Treasury of the United States, and properly belongs to the men who paid it into the Treasury. There is no means by which you can get it. There have been from time to time special bills presented to refund money in certain cases and to certain individuals, and the committee deemed it better to frame a general law TO COVER ALL THESE CASES" * * * . "Mr. Lounsbery. Can the gentleman refer to any opinion of the Secretary of the Interior, in which it is held that he has not the power to refund money under the section of the statute which has been read here, where a double minimum price has been paid and double minimum lands have not been granted. Mr. Berry. I do not know that I can refer directly to any written opinion of the Commissioner or of the Secretary of the Interior, but I called upon the Commissioner myself and he informed me that he could not refund this money for the reason, I believe it was, *that at the time of the sale, the Government regarded that as a double minimum.*"

Upon this representation in Congress by members of Con-

gress that the extra charge of $1.25 per acre made and paid for land found not to be within the limits of a railroad land grant, was money belonging to the purchasers and not to the United States, the Congress ordered the Secretary of the Interior to repay it to the owners and in strong, emphatic terms, commanded that officer to "draw his warrant on the Treasury" and declared that "the same shall be paid." This statute in specific terms acknowledges and determines a specific debt to be due the beneficiaries of the act and contracts to pay the debt. If this is not a statutory contract, no such contract ever existed. This contract gave the Secretary of the Interior no jurisdiction whatever to perform judicial or semi-judicial acts. The duty enjoined upon him is purely a ministerial duty and under the statute he had no power to do anything, except to draw his warrant on the Treasury for the money determined by statute to belong to the purchaser of the land who paid the extra price without any basis or consideration whatever.

Upon consideration of Sec. 2357 R. S. and of the second paragraph of the second section of the act of June 16, 1880, it is impossible to escape the conviction that Congress intended that all purchasers of public lands should have them at the price of $1.25 per acre, if not lands benefited by being within the limits of an actual grant of land by which a railroad near them was constructed and that purchasers of lands which from any cause were treated as lands thus benefited and for that reason subjected to the extra price, but which in fact were not thus benefited because not alternate reserved lands along the lines of railroads within the limits granted by any act of Congress, should have the extra price paid returned to them.

In view of this, how can the learned counsel for the appellees contend before this Court that this Court should construe the act of June 16, 1880, from which the law-makers excluded the words "erroneously charged" as if the law makers had actualy inserted them? And how can he ask this Court to construe this law in which the law makers inserted the words "to be" after the word "found" and who excluded the words "not to have been" after that word as if the last words quoted had been inserted in the law and the words "to be" excluded therefrom?

The learned counsel seems to be right in his assumption that his whole defense fails unless this Court will change the law as he admits the Secretary of the Interior has attempted to change it. This attempted change assumes that by some impossible blunder the Secretary of the Interior would sometimes charge land neither within the limits of any actual grant

nor within the limits of any grant contracted for the double minimum price and that in such cases only could any repayment be made. This ground of repayment is excluded from the statute, but is here offered to the Court in order to exclude from the law the sole ground of repayment embodied in the law. The law which the learned counsel now proposes to enact, would return the extra price of land if located immediately outside the limits of an actual grant by which a railroad was constructed and at the same time it would make a wholesale denial of such repayments as to lands purchased on the faith of the government embodied in a statute to cause to be constructed near them a railroad by a grant of the sections alternate to those subjected to the extra charge, but which by a subsequent abandonment by the Government and the proposed grantee were left hundreds of miles remote from any railroad communication. Congress never put a single word in any statute giving any shadow of color for such a pretension. If it be called a theory, it is a theory created out of whole cloth and is absolutely repugnant to every statute upon the subject of the price of public lands.

The second paragraph of the second section of the act of June 16, 1880, created an absolute equality of rights as to all purchasers of land at the double minimum price to have the extra $1.25 per acre returned to them if the lands purchased were afterwards found not to be within the limits of a railroad land grant. If the Secretary of the Interior pays any such purchasers, he is guilty of manifest discrimination against others having the same rights if he refuses to pay all. And if he pays any, his sole warrant therefor is because the statute makes the sum paid a debt payable, and upon this ground alone can he pay any. If any payments made are of debts payable, all such cases are debts due from the Government, and if they be debts payable, the sole power or jurisdiction the Secretary of the Interior has, is to draw his warrant upon the Treasury in payment, and the performance of this duty on his part is not an exercise of any jurisdiction involving the exercise of any judicial or discretionary authority, but is the performance of a purely ministerial act.

All these debts, in payment of which the Secretary of the Interior is by law commanded "to draw his warrant on the Treasury" are contract debts, and this contract for the payment of these debts is of the highest possible authority. If the Secretary refuses to obey the law and refuses to pay as in the case at bar, the unpaid debt is a contract debt, and the

Secretary of the Interior is wholly without power to impair this contract liability of the Government.

The brief of the learned counsel appears to be founded upon the assumption that all grants of land formulated and proposed in statutes are actual grants, regardless of the fact as to whether any railroad was ever constructed or whether any lands were ever transferred to the grantee.

A grant of land upon conditions is not an unconditional grant and a grant of land upon the condition that a railroad be constructed is no grant if the railroad be not constructed, and if the railroad be not constructed, there is no line of railroad, no alternate reserved land, and no limits of any grant made by any act of Congress. Upon such a state of facts, neither executive officers nor courts can assume the existence of a line of railroad, or the existence of alternate reserved lands, or the existence of any limits of a grant to a railroad made by any act of Congress. And without assuming the existence of all these, the price of $2.50 per acre fails absolutely and the one price of $1.25 per acre prevails. It is plain that where executive officers have assumed the existence of a line of railroad constructed by the appropriation of public lands, and the existence of a land grant, and the existence of alternate reserved lands along the line of railroad so constructed, and have by such assumption charged and received the extra price of $1.25 per acre, when in point of fact not one of the assumptions was warranted by existing facts. a supreme obligation rests on the Government to repay the extra price based on such assumption.

The learned counsel has introduced into his brief evidence of the fact that this supreme obligation was recognized as the reason for the enactment of the statute upon which this claim is based. The law makers distinctly stated that the money in such cases was in the Treasury but did not belong to the Government, but did belong to those who had paid that extra price. It is beyond question that Congress, in that statute, intended to recognize and make that fund a trust fund, due and payable to those who were subjected to the extra charge. This money is not only a debt due in the ordinary sense of the word, but it is a trust fund in the hands of the United States, and the United States as trustees cannot keep this money from the true owners of the fund without degredation and dishonor, such as cannot be attributed to the United States.

The authority of the Secretary of the Interior to treat a statute containing a conditional grant of lands made to construct a line of railroads from the time of its enactment up to the time of compliance with the conditions by the proposed grantee in all respects as an actual grant is clear, and this includes the running of the limits of the proposed grant, the identification of the lands to be granted and the identification of the lands to be reserved, and the holding of the lands to be reserved for sale at the price of $2.50 per acre. While doing all this, the Secretary was powerless to carry into effect the statute as to either class of lands thus identified until the construction of the aided railroad. Upon total and final failure of the grant contracted for, the government could not retain the $1.25 per acre extra price received for lands sold in consideration of the construction of the railroad by the aid of the appropriation of the sections of land alternate to those sold without a palpable betrayal of those who paid such extra price upon that consideration. Every conditional grant of lands immediately raises the question of price as to all lands designated to be reserved under the proposed grant and that question, although presumptively in favor of $2.50 per acre therefor, is never disposed of decisively till the grant is adjusted; and if the grant be finally adjusted by its forfeiture by act of Congress, it is then decisively settled that the price of the land proposed to be reserved in the forfeited grant is $1.25 per acre and not $2.50 per acre. Before forfeiture in every such case, the lands classed as reserved lands are sold at the presumptive price of $2.50 per acre. After forfeiture the whole of the lands which were to have been granted are sold at the statutory price of $1.25 per acre by the Government and all of the lands classed as reserved lands not sold at $2.50 per acre previously, are sold for $1.25 per acre. It can not be attributed by citizen, officer, or court to any statute enacted by Congress that any authority was ever given to perpetrate the monstrous injustice as to the disposition of public lands of equal value to citizens having equal rights that some should be charged and made to pay $2.50 per acre while others adjoining them were required to pay only $1.25 per acre. And yet, the action of the Secretary of the Interior, the denial of jurisdiction by the Court of Claims and the contention of learned counsel for the appellee in this court, we regret to be compelled to say, are all meaningless, unless they support and maintain this unparallelled wrong.

In the 9th finding of facts on page 5 of the record, it appears that the Secretary of the Interior assumes every conditional

grant of land for the constructson of railroads afterwards forfeited to be an actual grant, and that the price of $2.50 per acre for the lands designated for reservation, was not a price predicted upon the conditions contained in the statute, but was an absolute, final price fixed by law. In the case of Thos. Kearney, reported in this finding, it appears that the Secretary held that if his entry of land at $2.50 per acre had been made the day before the forfeiture of the grant, the Secretary would have denied payment to him of the extra price of $1.25 per acre, but the entry having been made *after* the forfeiture, he held that for that reason *alone*, he was entitled to be paid.

The assumption of the Secretary which constitutes the sole foundation of his ruling, is repugnant to reason and to law, because there never was a grant of lands where the land never passed from the grantor and where the alleged grantee never took title thereto. Upon consideration it will be seen that this assumption of the Secretary of the Interior constitutes no warrant whatever for his final action, for with the aid of this assumption, he is powerless to limit the law in his reading of the law enacted by Congress. This reading is as follows: "And in all cases where parties have paid double minimum price for the land which has afterwards been found not to be within the limits of a railroad land grant the excess of $1.25 per acre shall in like manner be repaid." This reading of the law renders absolutely ineffective the assumption of the Secretary of the Interior, because it is indisputable that land once included in a proposed grant of land at the time of the sale of the land, is found to be not within the limits of a railroad land grant by the highest authority in this country, when Congress extinguishes the proposed grant by statute. Both the Secretary of the Interior and the learned counsel for the appellee seem to be conscious of this difficulty, for they come to this court and ask that the reading of the statute be changed from the language of the statute quoted. The defense fails altogether unless the reading of the actual statute enacted by Congress be changed so as to read as follows: "And in all cases where parties have paid double minimum price for the land which has afterwards been found not to *have been* within the limits of a railroad land grant *at the time of purchase*."

This is the defense relied on in this court. It proposes to reject words used by the law-making power and incorporate words excluded from the law by that power.

If the reading proposed by the learned counsel and the Secretary of the Interior could be transformed into law, that law

would be an absurd nullity and would neither create for payment a debt, nor effect the payment of any gratuities, because it can not be supposed that the Secretary of the Interior controls and conducts public business entrusted to him in such a manner as to charge double minimum price for lands without any colorable ground for such charge, as would in fact be the case if he subjected $1.25 per acre lands outside of all limits of actual or proposed grants of land to the price of $2.50 per acre.

The learned counsel in his brief has shown to the Court that Congress enacted the second paragraph of the second section of the act of June 16, 1880, because before that the Secretary of the Interior refused to repay the extra $1.25 per acre in such cases upon the ground, "that at the time of the sale the Government regarded that as a double minimum." It is shown in the 9th finding, on page 5 of the record, that the Secretary assigned for his refusal to pay this debt, a reason identical to the reason the Secretary formerly assigned for non-payment of such cases to remedy which this statute was enacted. In connection with this, we have shown by analysis of the law and the reasons assigned for non-compliance therewith, a clear case of the attempted nullification of a statute, every word of which forms a part of a contract on the part of the Government to pay debts due the people and debts of no ordinary character, for the statute in terms shows that the money ordered to be paid is in the Treasury and does not belong to the United States, but does belong to certain creditors of the Government.

The learned counsel has printed as an appendix to his brief the opinion of the Court of Claims in the Foster case. That case represents nearly all the cases within the law which the Secretary of the Interior refuses to pay. They are claims of about $200 or less each, and therefore not appealable by the claimants to this court. The denial of jurisdiction by the Court of Claims, which was a great surprise to us, rendered it impossible to bring to this court the questions of law involved for review by any other method than the proceedings in the case at bar, which in fact is the only case we know of appealable to this court by reason of the amount involved.

Two statutes, each of which is a contract with the people of supreme authority have been set aside for annulment by executive officers charged with the great duty of their full and faithful execution.

The first is that of Sec. 2357 R. S., by which the price of all agricultural public land not alternate reserved lands along the line of railroads, within the limits granted by any act of Congress is made $1.25 per acre.

The second is the second paragraph of the second section of the act of June 16, 1880, which contracts with all purchasers of public lands, that if the lands purchased by them are at the sale treated as lands benefited by the construction of a railroad near them by aid of an appropriation of the alternate sections, and for that reason they were required to pay $2.50 per acre, and it afterwards turns out that the lands purchased are not so benefited and are not alternate reserved lands along the line of railroads within the limits granted by any act of Congress they shall be repaid the extra price of $1.25 per acre charged.

The Court of Claims has refused to disturb this attempted annulment by executive officers of statutory contracts with the people.

The sole question here is whether statutory contracts with purchasers of public lands embodied in the two statutes shall be enforced by the mandate of this court directing the Court of Claims to enter a judgment for extra price charged for lands for benefits never accorded the purchasers by the United States, in obedience to the commands of the Congress contained in the statutes cited.

We submit that the appellant is clearly entitled to the reversal of the judgment of the Court of Claims in this case.

HARVEY SPALDING,
E. W. SPALDING,
Attorneys for Appellant.